

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA AVERY

Claimant

VS.

LEONARDVILLE NURSING HOME INC.

Respondent

AND

**KANSAS HEALTHCARE ASSOCIATION
WORKERS COMPENSATION INSURANCE
TRUST**

Insurance Carrier

Docket No. 1,036,874

ORDER

Respondent appeals the April 18, 2008 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict (ALJ). Claimant was awarded temporary total disability compensation (TTD) commencing September 17, 2007, through March 11, 2008, after the ALJ determined that the release by David K. Ebelke, M.D., without restrictions was inappropriate.

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Kip A. Kubin of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held April 16, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

Respondent raises the following issues in its appeal to the Appeals Board:

1. Did the ALJ exceed his jurisdiction "in awarding the Claimant temporary total disability when there is no evidence of the same in the

record, and the court ignored uncontroverted evidence in the record"?¹

2. Does the Appeals Board have jurisdiction to consider this issue at this time?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and the appeal of respondent should be dismissed.

Claimant suffered significant low back pain while working as a CMA for respondent on January 22, 2007. As a result of that injury, claimant has been referred to a multitude of health care providers, has undergone a multitude of tests, including EMGs, bone scans and MRIs, has had physical therapy, and has been off work for a substantial period of time. One of the treating health care providers, David K. Ebelke, M.D., released claimant to return to work on September 18, 2007, without restriction, to regular duty.

After the release by Dr. Ebelke, claimant continued to experience pain. Therefore, claimant was sent by respondent to John M. Ciccarelli, M.D., an orthopedic surgeon, on January 4, 2008. Dr. Ciccarelli diagnosed claimant with L5-S1 left lumbar disc herniation and left S1 radiculopathy. On February 28, 2008, he restricted claimant from lifting over 20 pounds and restricted her from repetitive bending and lifting. On March 12, 2008, he performed a partial hemilaminotomy and a lumbar discectomy at L5-S1. On the date of surgery, claimant's TTD was restarted.

At the preliminary hearing on April 16, 2008, claimant requested TTD from September 17, 2007, through March 11, 2008. Respondent argues claimant is not entitled to TTD based on the return to work by Dr. Ebelke. Claimant argues the return to work was premature and TTD is proper. Claimant also argues the Appeals Board (Board) lacks the jurisdiction to determine the TTD issue on appeal from a preliminary hearing and this appeal should be dismissed.

¹ Application for Review at 1.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁴

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.⁵

The dispute presented at the hearing deals with claimant's request for TTD and respondent's objection to same. The ALJ awarded TTD after determining the release provided by Dr. Ebelke was inappropriate. Claimant was being treated for ongoing difficulties both before and after the release by Dr. Ebelke. The multiple opinions of the

² K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 44-534a(a)(2).

⁵ K.S.A. 2007 Supp. 44-551(2)(A).

other treating physicians were more persuasive than the lone release by Dr. Ebelke. As noted above, it is well within the jurisdiction of an administrative law judge to determine a claimant's entitlement to TTD at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁶

Here, the ALJ provided claimant with a preliminary hearing benefit as is the ALJ's responsibility. The ALJ did not exceed his jurisdiction in so doing. Therefore, the Board does not have jurisdiction over this matter on appeal from a preliminary hearing. Respondent's appeal of this matter should, therefore, be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The ALJ did not exceed his jurisdiction in granting claimant TTD in the preliminary hearing Order of April 18, 2008. Thus, the Board does not have jurisdiction to review this matter on appeal from a preliminary hearing order. Respondent's appeal of this matter should be, and is hereby, dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated April 18, 2008, remains in full force and effect and respondent's appeal of this matter is dismissed.

IT IS SO ORDERED.

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

⁷ K.S.A. 44-534a.

Dated this ____ day of July, 2008.

HONORABLE GARY M. KORTE

c: Jeff K. Cooper, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge